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IN THE

SUPREME COURT OF THE UNITED STATES

1974-75 TERM

Supreme Court, U. S.
FILED
DEC 18 1975
MICHAEL RODAK, JR., CLERK

No. 75-395

State of South Dakota, Acting by and through the Department of Transportation for the Division of Highways,

Petitioner

-vs-

Lawren V. Schumaker,

Respondent.

and

State of South Dakota, Acting by and through the Department of Transportation for the Division of Highways,

Petitioner

-vs-

Darlene Schumaker,

Respondent.

RESPONDENTS' BRIEF TO PETITION FOR WRIT OF CERTIORARI

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Respondent agrees with petitioner's statement of OPINIONS BELOW, JURISDICTION QUESTIONS PRESENTED, and CONSTITUTIONAL PROVISIONS INVOLVED.

STATEMENT OF THE CASE

Plaintiffs are seeking to impose personal liability on the named individual named defendant's for their alleged personal and individual negligence, and are not seeking money damages from the State of South Dakota.

Neither the Department of Transportation or the State of South Dakota were made defendants by the plaintiffs.

The State by attempting to intervene as real party in interest is merely attempting to invoke lack of jurisdiction by virtue of the Eleventh Amendment to the United States Constitution, and thus have the case dismissed against the individual defendants, which in effect would be to grant unto the individual defendants the immunity of the State.

Honorable Fred J. Nichol, Chief Judge of the United States District Court of South Dakota denied the State's position, which decision was affirmed by the Court of Appeals for the Eighth Circuit.

It would appear the only interest that the State has, is in the possible increased costs of premiums on a one million dollar insurance policy which it has purchased to cover employees individual negligence, just prior to the accident which left the plaintiff, Darlene Schumaker, paralyzed from the chest down. Such is not sufficient grounds for intervention.

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ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

The State attempts to intervene under Rule 24(a) (2) of the Federal Rules of Civil Procedure.

Under such rule, the State must claim an interest relating to the property or transaction which is the subject of the action " . . . and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicants' interest is adequately represented by existing parties. . ." Rule 24(a) (2)

It should be noted that the States' proposed answer is the same as the individual defendants'. The defendants' are represented by two very capable attorneys. Judge Nichol in his Memorandum Opinion (page 26 of Petitioner Brief) found:

" . . . assuming for the moment that the State has an interest within the meaning of Rule 24(a) (2), (it) is adequately represented by the present party defendants. . . ." Judge Nichol further found that these cases were not against the State and no damage judgment could run against the State in any event, and were therefore, not allowed to intervene citing Scheuer v. Rhodes, 416 U.S. 232 (1974), Edelman v. Jordan, 415 U.S. 651 (1974).

It should be further pointed out that the State did not present the lower court with any evidence of interest or inadequacy of representation, but a mere conclusion that it was the real party in interest. No affidavits or testimony was submitted by the State.

All cases cited in Petitioners' Brief has been previously distinguished by the Court and are cases against a governmental unit rather than against an individual, based upon that individuals' personal and individual negligence.

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For an excellent discussion of the personal liability of government officials as it relates to highways, see **The Law of Roadside Hazards**, Fitzpatrick, Sohn, Silfen and Wood, (1974). This is published by The Insurance Institute for Highway Safety. See Section 8.5, page 253 et seq.

The South Dakota courts have repeatedly held employees of government agencies **personally** liable in its' trial courts and particularly in *Loonan Lumber Company v. Wannamaker*, 81 S.D. 51, 131 NW2d 78 (1964). See also, *DeGooyer v. Harkness*, 70 S.D. 26, 13 NW2d 814 (1944); Restatement of the Law, Agency, Section 347; *Chart v. Dvorak*, Wisc., 203 NW2d 673 (1973); *Rush v. Pierson Contracting Company*, U.S. District Court, Michigan, 310 Federal Supplement, 1389 (1970).

The Court of Appeals in its' review of Judge Nichols' decision affirmed, holding that the Loonan Lumber Company v. Wannamaker case, supra, was the law of South Dakota.

CONCLUSION

It is respectfully submitted that all issues have been fully presented to the District Court and Court of Appeals, and they have concluded that the State may **not** intervene. Based upon the authority cited in those decisions and this Brief, it is respectfully submitted that the States' Petition should be denied.

Respectfully submitted,

Charles Poches, Jr.
One of the Attorneys
for Respondents

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